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The Carbon Co Sdn Bhd & Anor v Ng Lee Hoon (conducting under 'Forest Wood Flooring')

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–989–06 OF 2014
PRASAD ABRAHAM, ZABARIAH YUSOF AND ASMABI MOHAMAD JJCA
C 3 MARCH 2017

Civil Procedure — Pleadings — Failure to plead — Respondent filed action against appellant for trespass to goods and conversion — Respondent failed to disclose material facts — Whether respondent departed from pleaded case — Whether learned judge misdirected herself on basic principles of pleading

D

Evidence — Burden of proof — Whether plaintiff successfully discharged its burden — Respondent filed action against appellant for trespass to goods and conversion — Respondent failed to disclose material facts — Whether trial judge misdirected herself on principles pertaining to burden of proof — Whether decision wrong and merit curial intervention

E

F

Pursuant to an order by the Kuala Terengganu High Court, a piece of land located in Kemaman, Terengganu ('the said property'), then owned by Homeland Parquet Industries ('Homeland') was sold by public auction to the appellant. The respondent (a sole proprietor of Forest Wood Flooring) in the present case claimed that she had, with the consent of Homeland, placed her machine and business equipment ('the machineries') at the said property. The respondent averred that the appellant had wrongfully and/or unlawfully taken and/or removed the machineries from the said property to an undisclosed location without the respondent's permission and/or notice causing the respondent to suffered loss in the sum of approximately RM4,367,387.02. The respondent's action was premised on two causes of action ie conversion and trespass to goods. The High Court had allowed part of the respondent's claim in the sum of RM659,603.60. The appellant filed an appeal against the said decision whereas the respondent filed a cross-appeal to have the order that its claim for loss of profit in the sum of RM4,367,387.02 which was dismissed to be allowed. The appellant contended that the respondent's witnesses ie the respondent herself and her husband ('PW2'), had given evidence which were not based on the respondent's pleaded case.

G

H

I

Held, allowing the appellant's appeal, setting aside the High Court's order and

dismissing the respondent's cross-appeal with costs of RM20,000 to the appellant subject to allocator:

(1) From the statement of claim ('SOC'), the respondent's claim was simple and straight forward. The facts that were adduced through PW2 were never pleaded by the respondent either in her SOC or reply to the defence. The fact that the respondent's business was run by PW2 and the respondent was not involved in the business was never pleaded in the respondent's pleadings. Despite serious objection from the appellant, the learned judge had proceeded with the trial and allowed evidence to be adduced against the respondent's pleaded case. Based on authorities and principles on pleading, the respondent had departed from the pleaded case in the course of trial without any amendment been made to the pleading. This was fatal and ought not to have been condoned by the learned judge. The learned judge had misdirected herself on the basic principle as to pleading and on this ground alone, the appellant's appeal must be allowed (see paras 35 & 43–44).

(2) The learned judge had fallen into error in her finding that the respondent had established her case on the balance of probabilities and allowed the respondent's claim with damages in the sum of RM659,603.60, when there was contradictory evidence as to the ownership of the machineries, whether the machineries belong to the sole proprietorship or to PW2. The learned judge had relied on the evidence of PW2 to establish the respondent's case without the respondent's evidence having been adduced except for small negligible part with regards to signing two or three agreements and cheques at the instruction of PW2. The respondent (the plaintiff in the trial court) had to discharge her burden of proof to prove her case as well as to introduce evidence in support of her pleaded case. It was not the appellant's (the defendant in the trial court) duty to fill up the gaps in the respondent's case or be accused of not establishing their defence (see paras 45–46 & 49).

(3) Given the factual matrix of the case, the respondent had not discharged the burden of proof placed on her by the law, on the balance of probabilities. The learned judge had misdirected herself on the principle pertaining to burden of proof. The learned judge failed to judicially appreciate the evidence presented before her which rendered her decision plainly wrong and thus merit curial intervention (see paras 50–51).

[Bahasa Malaysia summary

Menurut perintah oleh Mahkamah Tinggi Kuala Terengganu, sebidang tanah yang terletak di Kemaman, Terengganu ('hartanah tersebut'), kemudian dimiliki oleh Homeland Parquet Industries ('Homeland') telah dijual melalui lelongan awam kepada perayu. Responden (pemilik tunggal Forest Wood Flooring) dalam kes ini mendakwa bahawa dia telah, dengan persetujan

A Homeland, meletakkan mesin dan peralatan perniagaannya ('mesin-mesin tersebut') di hartanah tersebut. Responden menegaskan bahawa perayu telah secara salah dan/atau secara tidak sah mengambil dan/atau mengalihkan mesin-mesin tersebut ke satu lokasi yang tidak didedahkan tanpa kebenaran dan/atau notis responden yang menyebabkan responden mengalami kerugian B sejumlah kira-kira RM4,367,387.02. Tindakan responden adalah berpremiskan dua kausa tindakan iaitu penukaran dan pencerobohan terhadap barangan. Mahkamah Tinggi membenarkan sebahagian daripada tuntutan responden sejumlah RM659,603.60. Perayu telah memfailkan rayuan terhadap keputusan tersebut manakala responden telah memfailkan rayuan C balas agar perintah yang mana tuntutannya untuk kehilangan keuntungan sejumlah RM4,367,387.02 yang telah ditolak kini dibenarkan. Perayu berhujah bahawa saksi-saksi responden iaitu responden sendiri dan suaminya ('PW2'), telah memberikan keterangan yang tidak berasaskan kes yang dipli oleh responden.

D

Diputuskan, membenarkan rayuan perayu, mengetepikan perintah Mahkamah Tinggi dan menolak rayuan balas responden dengan kos RM20,000 kepada perayu tertakluk kepada alokatur:

E (1) Berdasarkan penyataan tuntutan ('PP'), tuntutan responden adalah ringkas dan mudah. Fakta yang dikemukakan melalui PW2 tidak pernah dipli oleh responden sama ada dalam penyataan tuntutannya atau jawapan kepada pembelaan. Fakta bahawa perniagaan responden dijalankan oleh PW2 dan responden tidak terlibat dalam perniagaan F tidak pernah dipli dalam pliding responden. Walaupun terdapat bantahan serius daripada perayu, hakim yang bijaksana telah meneruskan perbicaraan dan membenarkan keterangan dikemukakan terhadap kes yang dipli oleh responden. Berdasarkan autoriti-autoriti dan prinsip-prinsip berhubungan pliding, responden telah menyimpang G daripada kes yang dipli sepanjang perbicaraan tanpa apa-apa pindaan dibuat kepada pliding itu. Ini adalah memudaratkan dan tidak patut dipersetujui oleh hakim yang bijaksana. Hakim yang bijaksana telah salah arah berhubung asas prinsip-prinsip kepada pliding dan atas alasan ini sahaja, rayuan perayu harus dibenarkan (lihat perenggan 35 & H 43–44).

(2) Hakim yang bijaksana telah terkhilaf dalam penemuan beliau bahawa responden telah membuktikan kesnya atas imbangan kebarangkalian dan membenarkan tuntutan responden dengan ganti rugi sejumlah RM659,603.60, walhal terdapat keterangan yang bercanggah I berhubung milikan mesin-mesin tersebut, sama ada mesin-mesin tersebut dimiliki oleh pemilik tunggal atau PW2. Hakim yang bijaksana bergantung kepada keterangan PW2 untuk membuktikan kes responden tanpa keterangan responden dikemukakan kecuali untuk sebahagian kecil yang cuai berkenaan penandatanganan dua atau tiga perjanjian dan

cek-cek atas arahan PW2. Responden (plaintif di mahkamah perbicaraan) terpaksa melepaskan beban buktinya untuk membuktikan kesnya dan juga untuk memperkenalkan keterangan untuk menyokong kes yang dipli olehnya. Ia bukan kewajipan perayu (defendan di mahkamah perbicaraan) untuk memenuhi jurang dalam kes responden atau dituduh kerana tidak membuktikan pembelaan mereka (lihat perenggan 45–46 & 49).

(3) Berdasarkan matriks faktual kes, responden tidak melepaskan beban bukti yang diletakkan ke atasnya oleh undang-undang, atas imbangan kebarangkalian. Hakim yang bijaksana telah salah arah diri sendiri berhubung prinsip berkaitan beban bukti. Hakim yang bijaksana telah gagal untuk secara kehakiman menghargai keterangan yang dikemukakan di hadapan beliau yang menyebabkan keputusannya jelas salah dan oleh itu mewajarkan campur tangan kurial (lihat perenggan 50–51).]

Notes

For cases on failure to plead, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7482–7490.

For cases on whether plaintiff successfully discharged its burden, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1051–1052.

Cases referred to

Abrath v The North Eastern Railway Company [1883] 11 QBD 440, CA (refd)

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615; [1992] 2 CLJ 1185, HC (folld)

Farrell v Secretary of State for Defence [1980] 1 All ER 166, HL (folld)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (folld)

Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik Syed Mohamed & Anor and other appeals [2000] 3 MLJ 328; [2000] 3 CLJ 797, CA (folld)

Menah Sulong v Lim Soo & Anor [1983] 1 CLJ 26; [1983] CLJ Rep 263, FC (folld)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (folld)

Selvaduray v Chinniah [1939] 1 MLJ 253; [1939] 1 LNS 107, SC (refd)

Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors [2015] 6 MLJ 810; [2016] 2 CLJ 414, CA (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ 1113; [1990] 1 CLJ Rep 330, SC (refd)

Legislation referred to

Companies Act 1965 s 233(1)
Evidence Act 1950 ss 2, 101(1)
National Land Code Form 16F
Rules of Court 2012 O 18 r 7

Appeal from: Civil Action No S-22–747 of 2010 (High Court, Kuala Lumpur)

Wong Kim Fatt (Hajinder Singh, Wong Boon Chong and Haris Tengku Rostam with him) (Hajinder & Assoc) for the appellants.
Vignesh Kumar Krishnasamy (Nurul Zaemah Abd Rahman with him) (Balendran Chong) for the respondent.

Asmabi Mohamad JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant (the defendant in the High Court) against of the decision of the High Court at Kuala Lumpur dated 5 May 2014, which allowed part of the respondent's (the plaintiff in the High Court) claim against the appellant, in that, the appellant was ordered to pay the respondent, damages in the sum of RM659,603.60 with cost and interest.

[2] The respondent in turn cross-appealed seeking to have the order that its claim for loss of profit in the sum of RM4,367,387.02 which was dismissed vide the order dated 5 May 2014, be allowed.

[3] For ease of reference, in this judgment the parties will be referred to as they were in the High Court.

BRIEF BACKGROUND OF FACTS

[4] The brief background facts (agreed facts as in document marked as 'E') had been set out by the learned judge in the grounds of judgement ('GOJ') at paras 1–5. In order to save judicial time, the same are reproduced as follows.

[5] The plaintiff is a sole proprietor trading under the name and style of 'Forest Wood Flooring', with her business address at No 66, Lorong Air Putih 21, Taman Seri Maju, 25300 Kuantan, Pahang.

[6] The defendant is a company with its registered address at 45B, Jalan Kepayang, Kawasan 16, Off Jalan Meru, 41050 Klang, Selangor Darul Ehsan and its business address at Lot 2126, No 286, Jalan Pulau Carey 42500, Telok

Panglima Garang, Selangor Darul Ehsan.

[7] Pursuant to an order by the Kuala Trengganu High Court dated 26 August 1999 vide Originating Summons No 24–35 of 1999, the land described as HS (D) 2485, PT-No 111, Mukim Bandi, Daerah Kemaman, Trengganu Darul Iman, then owned by Homeland Parquet Industries ('Homeland') and charged to Malayan Banking Bhd ('the property'), was sold by public auction.

[8] Homeland had since been wound up pursuant to an order of the court dated 13 August 1999.

[9] The plaintiff is one of the directors in a company known as Greenwood Corp (M) Sdn Bhd with its address as that of Homeland.

[10] The plaintiff's husband, one Lee Guan Choon, is a shareholder of Greenwood Corp (M) Sdn Bhd and is also a director of Homeland.

[11] On or about 28 September 2009, pursuant to a public auction held at Kuala Terengganu High Court, the defendant was the successful bidder for the said property which was auctioned off at RM3,060,000.

[12] Around the material time, the plaintiff claimed that she had, with the consent of Homeland, placed her machine and business equipment ('the machineries') at the said property for purposes of storage.

[13] The plaintiff alleged that the defendant had wrongfully and/or unlawfully taken and/or removed the machineries from the said property to an undisclosed location without the plaintiff's permission and/or notice causing the plaintiff to suffer loss in the sum of approximately RM4,367,387.02. The particulars of plaintiff's loss and damages are as set out in para 9 of the plaintiff's statement of claim ('SOC').

[14] A legal demand was made by the plaintiff through her solicitors by notice of demand dated 12 May 2010 for the sum of RM4,367,387.02.

[15] When the defendant failed to pay the amount claimed, the plaintiff commenced this suit on 10 August 2010.

[16] The defendant refuted the plaintiff's claim and in its amended defence, the defendant alleged that it has successfully bid for the said property and before taking possession of the said property, it has advertised public notices in two newspapers giving notice to the owner of the machineries to claim the

machineries within a specified period. The defendant claimed that the plaintiff's husband, came to the property and took away the machineries which were reported to the police. The defendant denied that the plaintiff was the owner of the machineries.

IN THE HIGH COURT

The plaintiff's case

[17] The plaintiff's case is predicated on two causes of action, conversion and trespass to goods.

[18] Briefly stated, the plaintiff's case is that:

(a) the plaintiff is a sole proprietorship which deals with the refurbishment, repair and sale of used machineries relating to the manufacturing of wood products;

(b) the plaintiff was given permission by Homeland to store her machineries and stock woods at the said property;

(c) around or about 28 September 2009, when the property was put up for auction sanctioned by the court, the plaintiff had stored her machineries at the said property;

(d) on or about 13 October 2009, the plaintiff's representative received a telephone call from the defendant's agent informing the plaintiff that the defendant's agent was at the front gate of the property and wished to enter and take possession of the said property as the property had been sold to the defendant by way of a public auction;

(e) the plaintiff then informed the defendant that she had not received any notice for her to vacate the said property and informed the caller that even if the property had been auctioned vide a public auction, the auction only involved the property and did not include the machineries stored at the said property. The plaintiff indicated her intention to hold discussion with the defendant so that the matter could be resolved but the defendant had refused to accede to the plaintiff's request;

(f) on 16 October 2005, the defendant had without any notice and/or prior permission of the plaintiff caused the machineries belonging to the plaintiff to be removed or taken out from the said property to an undisclosed location, causing the plaintiff to suffer loss and damages amounting to RM4,367,387.02;

(g) the particulars of the plaintiff's loss were as stated in the SOC dated 10 August 2010 at para 9. This loss includes loss of profits and the cost of termination of the contract;

(h) despite repeated demands from the plaintiff, the defendant had refused and/or neglected to pay the plaintiff the sum of RM4,367,387.02; and

(i) by her SOC dated 10 August 2010, the plaintiff claimed from the defendant the said sum including interests.

The defendant's case

[19] The defendant's defence to the plaintiff's claim could be briefly stated as follows:

(a) the defendant has successfully bidded for the said property vide a public auction conducted by the Terengganu Court and pursuant to an order dated 28 September 2009. Before taking possession of the said property, the defendant had caused advertisements to be put in two daily newspapers notifying the claimant to the machineries to come forward and claim these machineries within the time stipulated in the said notices;

(b) the defendant denied that the plaintiff was the owner of the machineries and/or that the plaintiff had suffered damages and/or loss. In any event, the plaintiff is not entitled to claim any damages from the defendant for the following reasons:

(i) the company known as Homeland had been wound up on 13 August 1999;

(ii) the plaintiff's business was registered on 31 May 2002; and

(iii) before the defendant took possession of the said property, the defendant had on 8 October 2009 and 7 October 2009 caused notices to be issued in *The Sun* newspaper (the English language daily newspaper) and in the *Utusan* newspaper (the National language newspaper) and the defendant had, amongst others, given notice to the owners of the machineries to contact the defendant within seven days from the date of these notices to claim the said machineries;

(c) the plaintiff had attempted to break open the said property by using unreasonable force and/or had attempted to commit breach of trust which led the defendant to lodge a police report;

(d) alternatively, the defendant stated that the plaintiff was one of the directors of Greenwood Corp (M) Sdn Bhd which address was at the said property, previously owned by Homeland Parquet Industries Sdn Bhd, where the plaintiff's husband by the name of Lee Guan Choon was one of the shareholders of the said company;

(e) the plaintiff's husband is also a director in Homeland;

(f) all the machineries found at the said property were subject to hire purchase agreements with Maybank Finance Bhd with account numbers as particularized in para 15 of the amended defence. All these agreements had been terminated vide letters issued by Maybank Finance Bhd through its Solicitors Messrs Choong Yik Son & Fiona Ghaus;

(g) after the merger between Maybank Finance Bhd and Malayan Banking Bhd on 17 August 2004, vide Originating Summons No D4–24–231 of 2004 and the order for sale and transfer of asset dated 30 May 2004 obtained vide Originating Summons No D1–24–161 of 2007 was given to Gale Force Sdn Bhd by Malayan Banking Bhd;

(h) ever since the defendant became the successful bidder in the public auction dated 28 September 2009 and subsequently had paid the full purchase price of the said property, the defendant was subject to harassment by certain people, including the plaintiff's husband and/or persons known to the plaintiff or persons known to her husband resulting in police reports having been lodged by the defendant on 16 October 2009 and 22 May 2011 respectively;

(i) on 1 February 2012, the machineries were stolen and/or taken out from the said property without the defendant's knowledge and/or permission and a police report was lodged vide Ayer Putih/0000–57/12 dated 3 February 2012 and Ayer Putih Report/000064/12 dated 5 February 2012 respectively;

(j) the plaintiff's claim did not disclose a reasonable cause of action against the defendant, frivolous and vexatious, and an abuse of the process of court; and

(k) based on the above, the plaintiff was not entitled to her claim.

THE ISSUES

[20] The issues posed for the determination of the High Court were as stated in para 11.1 of the GOJ as follows:

(a) whether the plaintiff had placed the machineries in the said property with the knowledge and permission of Homeland?

(b) whether the defendant had wrongly taken out and/or removed the plaintiff's machineries from the property?

(c) whether the defendant had deliberately and intentionally removed, taken out and/or transferred the plaintiff's machineries from the said property?

(d) whether the defendant is liable to compensate the plaintiff for the damages suffered as a result of the loss of the machineries in the sum of RM4,367,387.02 with interest? and

(e) whether there was a phone call made by the defendant to the plaintiff on 15 October 2009 at about 3pm informing the plaintiff that it was the successful bidder of the property and intended to take possession of the said property?

THE APPEAL/CROSS-APPEAL

[21] We heard this appeal by the defendant and the cross-appeal by the plaintiff on 1 June 2016. After having perused the appeal records, the written submissions filed herein and having heard both learned counsels' oral submissions, we disposed the defendant's appeal by allowing the same with costs and set aside the order of the High Court dated 5 May 2014. With respect to the cross-appeal filed by the plaintiff, we dismissed the cross-appeal with costs. After hearing a short submission on the issue of costs we awarded costs in the sum of RM20,000 to the defendant subject to allocator. We ordered for the deposits to be refunded to the plaintiff.

[22] Before we delve with our reasoning for the above decisions, it would be appropriate at this juncture to refer to the learned judge's finding of facts, to ascertain if the plaintiff had met the threshold of establishing its pleaded case on the balance of probabilities.

FINDINGS OF THE LEARNED JUDGE

[23] The learned judge made the following findings:

Defective pleading/no cause of action:

(a) the first issue raised by the defendant was that the plaintiff's pleadings were defective and the plaintiff has no cause of action against the defendant;

(b) the defendant submitted that the plaintiff's pleading was defective as it had failed to identify any cause of action in the SOC. Based on the pleaded paragraphs as stated in the SOC and the general and accepted method of pleading, the plaintiff failed to construe either cause of action, whether in trespass to goods or conversion;

(c) besides the defective pleading, it was also the contention of the defendant that during the trial, the plaintiff had failed to establish either through her witnesses or the documents tendered in court, the existence of duty of care between the plaintiff and the defendant; and

(d) the learned judge made a ruling that, upon a perusal of paras 5, 6, 7 and 8, of the SOC, she was satisfied that the plaintiff has pleaded both causes of action as required under O 18 r 7 of the ROC 2012 ie for trespass to goods and conversion. The learned judge found that the defendant had trespassed on the plaintiff's machineries which were stored in the said property, wrongfully removing the machineries and the removal was intentionally done without the plaintiff's permission and knowledge.

Whether the plaintiff has locus standi to sue:

(a) the defendant contended that the plaintiff has no locus standi to commence the proceedings against the defendant because PW1 had pleaded that she is the sole proprietor of Forest Wood Flooring, but at the trial she testified that the business was not managed by her. Instead, it was managed by her husband, PW2 who was solely responsible for her business. PW1's evidence showed that she played a very negligible role in Forest Wood Flooring and that it was under PW2's control (see pp 1168–1171 of appeal record Part B and C *Jld* 5);

(b) in addition to that, the defendant had also contended that the plaintiff did not plead that PW2 was the main person behind the said sole proprietorship and he was in fact the actual owner of the business;

(c) the learned judge was of the view that there was no merit on the issue raised by the defendant, that the plaintiff was a nominal plaintiff who was suing for the benefit of some other person and there was reason to believe that she was unable to pay costs of the defendant if ordered to do so;

(d) to this line of argument, the learned judge found that the fact the defendant had filed an application for security for cost and subsequently withdrew the application would tantamount to waiving the issue and conceding that the plaintiff is not a nominal plaintiff and has the necessary locus to bring the action against the defendant. The learned judge ruled that as the defendant had not produced any evidence that the plaintiff is a nominal plaintiff, the defendant's contention must fall;

(e) further the learned judge made a ruling that based on the evidence before her as stated in line 15–35 at p 19 of the GOJ, she found that there was evidence to negate the existence of any assignment of any debt by the plaintiff's husband to the plaintiff, or that the plaintiff was suing for her husband's benefit. This ruling was based on the following:

(i) at all the material time the plaintiff is suing in her capacity as a sole proprietor of the business known as Forest Wood Flooring;

(ii) the plaintiff had started her business since 31 May 2002 and continued to trade until the machineries were removed by the defendant;

(iii) the plaintiff's had amongst others signed agreements, cheques and obtained loan/financing for the benefit of the plaintiff's business;

(iv) the fact that PW2 is the plaintiff's husband was never denied by the plaintiff. Both the plaintiff and her husband had stated that Lee Guan Choon is more experienced in managing the plaintiff's business. As such most of the work was done PW2; and

(v) PW2 was only working for the plaintiff for which monthly salary has been paid by the plaintiff. The salary was subject to EPF and tax deductions.

Existence of machines:

(a) with respect to the machineries, the learned judge found that the defendant's submission that the evidence of DW2, one Dato' Eugene Lau in his evidence in chief that the defendant had taken vacant possession of the said property in October 2009 could not be correct. According to the learned judge, the defendant could not be said to have paid the full price within the stipulated time and taken possession of the property sometime in October 2009;

(b) the learned judge found that the statement by PW2 that the defendant had taken possession of the property sometime in October 2009 could not be correct. Firstly, as at the time the defendant took vacant possession of the property on 15 October 2009, the defendant was not the registered owner since Form 16F was dated 11 January 2010. The property was only registered under the defendant's name on 15 August 2010 as per the land search dated 5 July 2011. Therefore as at 15 October 2009, the defendant has no right to enter the said property and remove the machineries;

(c) secondly, based on the proclamation of sale dated 28 September 2009, there was no mention that the purchase of the property also included the machineries found in the said property (see exh P9 at pp 60–64 of core bundle Part A and B);

(d) thirdly, at the time the defendant took possession of the property, by conduct the defendant was aware of the existence of the machineries which were not part of the auctioned property. The fact that the defendant advertised notices in newspapers of *The Sun* and *Utusan Malaysia* on 8 October 2009 and 7 October 2009 respectively, inviting any claimant to come forward to claim the machineries proved that the defendant was aware the machineries did not belong to them;

(e) fourthly, the defendant could not be said to have an indefeasible title to the property by merely paying 10% of the purchase price. In law, only on payment of the full purchase price that the defendant could be said to have beneficial interest in the property. As the defendant was neither the

registered owner nor a beneficial owner, the defendant has no right to remove the plaintiff's machineries and/or to place the advertisement in the newspapers;

(f) although Homeland was wound up on 13 August 1999, the property was not vested with the liquidator pursuant to s 233(1) of the Companies Act 1965; and

(g) based on the evidence adduced before her, the learned judge found that the evidence of PW2 that he carried on the business of the plaintiff trading principally in machines and wood materials, sale and purchase of used machines, repair and upgrading of the machine to be sold for profit at the said property which belong to Homeland Parquet Sdn Bhd before it was wound up, remained unrebutted.

Evidence of ownership of the machineries

(a) it was the submission of the defendant, that despite the defendant's contention that the plaintiff was unable to show proof that the machineries referred to, in the documents tendered in court because the plaintiff's witnesses Pang Kiew Kun ('PW3') (a representative of Goindustry Dove Bid Malaysia), Murugan ('PW4'), (a Director of Mariposa) and Bee Chen Yen ('PW9'), (a representative of Dagang Nusantara Sdn Bhd) had no personal knowledge of the matter, the learned judge decided that based on the testimony of PW2, the plaintiff's husband and supported by the testimony of the representatives of the suppliers, the plaintiff had proven her case on the balance of probabilities;

(b) a perusal of the GOJ at pp 27–29 and 31–32, showed that the learned judge had relied on the evidence of PW2 extensively to prove the plaintiff's case against the defendant. The learned judge was satisfied that the purchases of the machineries were made by the plaintiff from the following evidence:

(i) the evidence of PW2 that the nature of the plaintiff's business in dealing with sale and purchase of used or second hand machines, repair and upgrading of these machineries which would be sold at a profit margin;

(ii) the machineries were purchased between 2005–2009;

(iii) the machineries were purchased using PW2's own funds or on credit from the suppliers;

(iv) the transaction with Perpa Parquet Sdn Bhd ('Perpa Parquet') is evidenced by the sale and purchase contract dated 3 October 2005 for the purchase of Second Hand Woodworking Equipment (exh P1 at pp 5–15 of core bundle Part C) with invoice and

payment voucher to Perpa Parquet in the sum of RM350,000 (exh P16 at pp 17–19 core bundle Part C) and official receipt ('exh P17') and letter of release by Perpa Parquet ('exh P19');

(v) PW2's transaction with Goindustry Henry Butcher International, Valuers and Auctioneers in London showed that PW2 bidded in online auctions of Goindustry Henry Butcher and was successful in purchasing three lots of machine (Lot Nos 928646, 928647 and 928648 respectively) through exhs P30, P31, P32, P33, P34, P35, P36, and P37 (at pp 1550–1560 of *RR* Part B and C *Jld* 7);

(vi) PW2's transaction with Goindustry Appelboom NV ('Goindustry Appelboom'), Valuers and Auctioneers in Belgium on online auctions and was successful in purchasing six lots pf machines (Lots 1000153, 1000157 and 1000158 respectively) through exhs P49, P50, P51, P52, P53, P54, P55, P56, P57, P58, P59, P60, P61, P62 and P63 (at pp 1587–1599 of *RR* Part B and C *Jld* 7, p 207 core bundle Part C and 1611–1612 of *RR* Part B and C *Jld* 7);

(vii) PW2's transaction with Dagang Nusantara Sdn Bhd ('Dagang Nusantara') for the purchase of a unit of reconditioned CNC router through exhs P68 and P69. Dagang Nusantara was also the service provider and repairer of machine, engaged by PW2 to repair and service his machines;

(viii) PW2's transaction with Meng Seng Engineering Sdn Bhd ('Meng Seng') for the purchase of two units of Reconditioned Carpenter Multiple Rip Saw and Reconditioned Engineered Floor Board T & G (see exh P71 at p 1635 of *RR* Part B and C *Jld* 7). Meng Seng was also the service provider and repairer of machine, engaged by PW2 to repair and service his machines;

(ix) the evidence of the suppliers ('PW5') supported PW2's testimony as in exhs P16, P17 & P19 respectively at pp 1414–1418 of *RR* Part B and C *Jld* 1;

(x) the evidence of PW3 through exhs P30 and P49 although could not be positively identified by PW3 but based on the learned judge's perusal of these exhibits, the exhibits matched all the respective documents which PW2 relied as proof of his purchase; and

(xi) based on the above, the learned judge found that there was no 'gap' in the evidence presented by the plaintiff.

(c) despite the argument of the defendant that PW2 was not a credible witness as he had committed perjury in two aspects of his evidence whilst testifying in court, as stated in line 15–20 of p 24 of the *ikatan teras perayu* and even assuming that the court could not rely on the photographs tendered in court, a comparison between the specifications

of the machineries claimed by the plaintiff and the ones under the Homeland Parquet hire purchase agreement with Maybank there were differences which the learned judge had identified in line 10–30 of the GOJ at p 26 which are:

(i) the suppliers were different;

(ii) the main functions of the machines under hire purchase was for filtration, bandsaw and sanding machine whereas the machineries under the claim were multi spindle drilling, CNC machine and general wood floor making machine supplied by Perpa Parquet, Meng Seng and Dagang Nusantara respectively;

(iii) the hire purchase machine and the plaintiff's machineries were of different brands;

(iv) the condition of the machineries under hire purchase were new but the plaintiff's machineries were either used or second hand; and

(v) the machines under hire purchase were purchased between 1995 to 1997 whereas the plaintiff's machineries were purchased around 2005–2009;

Whether the machineries were removed deliberately and intentionally by the defendant:

(a) the learned judge's analysis of the evidence pertaining to the events which led to the removal of the machineries from the said property and/or whether such removal was deliberately or intentionally done by the defendant could be gauged from pp 35–39 of the GOJ;

(b) the learned judge found that there were conflicting evidence between PW2 and DW1 with respect to this matter and the learned judge preferred the evidence of the plaintiff to that of the defendant;

(c) the learned judge was more persuaded to accept the evidence of PW2 on what transpired on 16 October 2009 as his evidence was supported by contemporaneous evidence of his police report lodged on 16 October 2009 at 4.45pm as well as the evidence of PW10, the plaintiff's worker who carried out the repairs to the machineries and guarded the property as compared to the evidence of DW2. In the police report, PW2 had stated that the machineries stored in the said property belong to PW1 personally. PW2 had given the instruction to his guard not to let anyone into the property until he arrived the next day which was agreed to by the guard (see p 83 of *ikatan dokumen teras*);

(d) a perusal of the notes of proceedings would also show on the same date, 16 October 2009 at about 7pm the defendant too had lodged a report pertaining to the same event where the defendant alleged four

unidentified men were said to have entered the property by force despite being prohibited from doing so by the guard on duty (see exh D87); and

(e) the removal of the machineries were supported by exhs P14 and P86, the evidence of PW2, PW10 who reported to PW2 of the arrival of the five men to the property and evidence of PW11 that he had helped PW2 to trail the movement of the removal of the machineries which were identified by PW2.

OUR DECISION

[24] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance.

[25] In the course of that, we had sought guidance from the very often quoted case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> an appellate court will not generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[26] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and the established evidence.

[27] Guided by the above established principle, we had therefore carefully examined the documents that were placed before us in the form of the record of appeal to ascertain if the learned High Court judge had arrived at her decision correctly on the basis of the relevant law and evidence before her.

[28] We had examined the SOC very carefully and found that the plaintiff's pleadings were plain and simple. For ease of reference we restate the plaintiff's pleadings herein for the same to be examined against the evidence that was allowed to be adduced in the plaintiff's favour as follows:

(a) she was operating her business as a sole proprietor dealing with refurbishment, repair and sale of used machineries relating to the manufacture of wood products;

A (b) the plaintiff had purchased used and second hand machineries for the purpose of her business;

(c) she had kept her machineries at the property with the permission of Homeland;

B (d) the plaintiff and/or her representative had received a telephone call from the defendant to notify the plaintiff that they were the successful bidder and the new owner of the property which was sold to them at the court sanctioned auction. The defendant intended to take vacant possession of the property;

C (e) the plaintiff sought to discuss with the defendant as her machineries were still stored in the said property;

(f) the defendant had wrongfully and/or deliberately removed the said machineries without any notice and/or without the permission of the D plaintiff; and

(g) as a result of the defendant's unlawful and wrongful action, the plaintiff incurred substantial losses and damage amounting to RM4,367,387.02.

E **[29]** We had perused the notes of the proceedings, especially the evidence of the plaintiff, Ng Lee Hoon ('PW1'), who described herself as a sole proprietor of Forest Wood Flooring and found that the plaintiff had attempted to introduce evidence which was not premised on her pleaded case. Throughout her testimony, the plaintiff did not seem to know anything about her case but F depended solely on the evidence of her husband, Lee Guan Choon (PW2'). This could be seen in PW2's and the plaintiff's witness statements ('PW1') (see pp 1173–1198, 1168–1171 of *RR Bahagian* B and C *Jld* 5, cross-examination of PW2 at pp 528–631 of RR *Bahagian* B and C *Jld* 2 and pp 996–1043 of RR G *Bahagian* B and C *Jld* 4 and PW1 at pp 305–321 of RR *Bahagian* B and C *Jld* 1.

[30] In her testimony the plaintiff said that her role was merely to sign two or three agreements and cheques as and when directed by her husband PW2. The rest of her business was run by PW2 solely, who was familiar with the facts H surrounding the claim (see pp 1169–1170 ('PW1') and 1173–1174 ('PW2') of appeal record Part A and B Vol 5).

[31] We noted that the plaintiff attempted to introduce evidence on facts not pleaded in her SOC, and/or introduced evidence contrary to the plaintiff's I pleaded case. This could be seen in the notes of proceedings where the learned counsel for the defendant had objected to the line of questioning adopted by the plaintiff when both PW1 and PW2 were giving evidence on the ground that it was not based on the plaintiff's pleaded case. In fact, the plaintiff had relied solely on the evidence of her husband, PW2 who was in fact the real

mind behind the plaintiff's business because it was PW2 who was actually running the business despite no facts pleaded in the SOC pertaining to the role of PW2 in the plaintiff's business.

[32] Notwithstanding, the serious objections that were taken up during the trial by the learned counsel for the defendant, the learned judge overruled these objections and allowed the learned counsel for the plaintiff to proceed to introduce evidence contrary to the plaintiff's pleaded case (see pp 289–296 during the testimony of PW1 and at pp 329–341 of appeal record Part B and C *Jld* 1).

[33] We had shown above that the learned judge had accepted the evidence adduced by PW2, the plaintiff's key witness, based on the plaintiff's unpleaded case to rule that the plaintiff had established her case on the balance of probabilities. How could the plaintiff be said to have proven her case on the balance of probabilities when she knew nothing about the whole case except having signed two or three documents or signing cheques as and when instructed by PW2. This is supported by the tone in both PW1's and PW'2 witness statements (pp 1168–1171, 1173–1198 of *RR Bahagian* B and C *Jld* 5).

[34] If the plaintiff had opted to run her business in the manner that was done in this case, the plaintiff ought to have pleaded those facts in the SOC so as to give sufficient notice to the defendant of her pleaded case, to enable the defendant to properly prepare their defence and the evidence for the purpose of the trial.

[35] We noted that from the SOC, the plaintiff's claim was simple and straight forward. The facts that were adduced through PW2 were never pleaded by the plaintiff either in her SOC or reply to the defence. The fact that the plaintiff's business was actually run by PW2 and the plaintiff was not involved in the business was never pleaded in the plaintiff's pleadings.

[36] Pleadings play an important role in civil litigation, as parties are bound by their respective pleadings. This is trite. The facts pleaded in the pleadings will define the parameters of each party's case and serve as a clear notice to the adverse party the case that will be adjudicated so as to prevent either party from being taken by surprise during trial. Pleadings too will serve a guide to the court in determining the issues to be tried.

[37] In resolving the issues before the court, the court must rely solely on the pleadings prepared and filed in court. The significance of pleadings had been dealt with in a plethora of cases. In *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 (HL), His Lordship Lord Edmund-Davies had this to say:

> It has become fashionable these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed may on occasion have led to its being defeated. But pleadings continue to play an important part in civil actions, and although there had been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove unfortunate in trials with jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove vital importance. That purposes is to define the issues and thereby to inform the parties in advance the case they have to meet and to enable them to take steps to deal with it.

[38] The importance of pleadings had also been emphasised by the Federal Court in *Menah Sulong v Lim Soo & Anor* [1983] 1 CLJ 26; [1983] CLJ Rep 263 where the Federal Court held:

> I think it is necessary in this case to emphasize once again that the court should give their decision in strict compliance with the pleadings.

[39] The court is not entitled to decide the case on a matter not pleaded and the trial must be confined to the pleadings (see *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ 1113 [1990] 1 CLJ Rep 330; and *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; [1992] 2 CLJ 1185).

[40] The need to plead all material facts will be appreciated when the litigants consider the principle that the parties are barred from adducing evidence of unpleaded facts during trial (see *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; [1992] 2 CLJ 1185; *Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik Syed Mohamed & Anor and other appeals* [2000] 3 MLJ 328; [2000] 3 CLJ 797 (CA)).

[41] It is also an established principle that it is not the function of the court to build a case for the litigants, inconsistent with the pleadings. The Supreme Court in *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ 1113; [1990] 1 CLJ Rep 330 held as follows:

> In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to pleas on which the parties are at variance.

[42] In *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665 the Federal Court held as follows:

> [35] On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[43] Guided by the above authorities and the legal principles on pleading as discussed above, we were of the considered view that the plaintiff had departed from the pleaded case in the course of the trial without any amendment been made to the pleading. This is fatal and ought not to have been condoned by the learned judge. We also observed that despite serious objections having been made by the learned counsel for the defendant, the learned judge had proceeded with the trial and allowed evidence to be adduced against the plaintiff's pleaded case. As pleading rules is one relating to fairness, the court should at all times maintain the fairness process. Clearly, the learned judge had erred on this point.

[44] As such, we were constraint to rule that the learned judge had misdirected herself on the basic principle as to pleading and on this ground alone, this appeal by the defendant must be allowed.

[45] For the sake of completeness, we would also delve with the issue pertaining to burden of proof. We observe that the learned judge had fallen into error in her finding that the plaintiff had established her case on the balance of probabilities and allowed the plaintiff's claim with damages in the sum of RM659,603.60, when there was contradictory evidence as to the ownership of the machineries, whether the machineries belong to the sole proprietorship or to PW2. We have clear evidence from the plaintiff that on one hand she has no knowledge of her pleaded case, and on the other hand we also have the evidence of PW2 who claimed that the machineries belong to him as he was the one who purchased the property from his own funds (see the police report made by PW2 on 16 October 2009 at p 83 of core bundle, PW2's witness statement at Q & A 36 at p 82 of the core bundle), and his evidence throughout the proceedings that he was solely responsible for the operation of the sole proprietorship and his wife played only a minimal role in the business.

[46] We have also attempted to show earlier in this judgment that the learned judge had relied on the evidence of PW2 to establish the plaintiff's case without the plaintiff's evidence having been adduced except for small negligible part with regards to signing two or three agreements and cheques at the instruction of PW2, which PW1 admitted other than affixing her signature on those documents of which she knew nothing of.

[47] In short from the testimony of PW1 and PW2, it is clearly established that the plaintiff ('PW1') was not running the sole proprietorship but it was her husband, PW2 who was in full control.

[48] The plaintiff in her pleading failed to mention how PW2 is the actual owner of the sole proprietorship. The testimony of PW1 clearly showed PW1 was not playing any role in the sole proprietorship at all. The sole proprietorship was in full control of PW2.

[49] The law on the burden of proof is so settled. Pursuant to s 101(1) of the Evidence Act 1950, a party who desires the court to give judgment in its favour as to the legal right or liability bears the burden to prove its case. The burden of proof on that party is twofold, firstly the burden of establishing a case and secondly the burden of introducing evidence. This burden lies on the party throughout the case and the standard of proof is on the balance of probabilities. Once that party has discharged its evidential burden of proof then the burden would then shift to its adversary. If a party has failed to discharge its burden of proof on the standard required by the law, his adversary does not bear the burden to adduce any evidence. In the case at hand, the plaintiff, a sole proprietor has to discharge her burden of proof to prove her case as well as to introduce evidence in support of her pleaded case. It is not the defendant's duty to fill up the gaps in the plaintiff's case/or be accused of not establishing their defence (see *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] 6 MLJ 810; [2016] 2 CLJ 414; *Selvaduray v Chinniah* [1939] 1 MLJ 253; [1939] 1 LNS 107 (SC); s 2 of the Evidence Act 1950; *Abrath v The North Eastern Railway Company* [1883] 11 QBD 440 (CA)).

[50] The question we need to ask ourselves is that, given these factual matrix can the plaintiff be said to have discharged the burden of proof placed on her by the law, on the balance of probabilities. Our answer is in the negative.

[51] We are of the view that the learned judge had misdirected herself on the principle pertaining to burden of proof as discussed above. For the foregoing reasons, we are constrained to hold that the learned judge failed to judicially appreciate the evidence presented before her so as to render her decision plainly wrong and thus merit curial intervention.

[52] On the whole we are of the view that the learned judge had misdirected herself on these two aspects as discussed above and the judgment of the learned judge could not be sustained.

CONCLUSION

[53] Having examined the evidence both testimonial as well as documentaries, we were satisfied that the learned judge had failed to properly and sufficiently evaluate the evidence adduced before the court. This warranted our intervention.

[54] We were unanimous in our decision. For the reasons set out above, we allowed the defendant's appeal against part of the learned judge's decision which allowed the plaintiff's claim against the defendant, with damages assessed in the sum of RM659,603.60 with cost and interests. The High Court order in relation to the above is therefore set aside. We also dismissed the plaintiff's cross-appeal with costs. We ordered costs to the defendant in the sum of RM20,000, subject to allocator. We also ordered for the deposit to be refunded to the appellant.

Appellant's appeal allowed; High Court's order set aside; respondent's cross-appeal dismissed with costs of RM20,000 to the appellant subject to allocator.

Reported by Dzulqarnain Ab Fatar